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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JOHN JACOB OLIVAS, Defendant.	ED CR No. 18-231-JGB <u>GOVERNMENT'S TRIAL MEMORANDUM</u> Trial Date: November 30, 2021 Location: Courtroom of the Hon. Jesús G. Bernal
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22 Plaintiff United States of America, by and through its counsel
23 of record, the United States Attorney for the Central District of
24 California and Assistant United States Attorneys Eli A. Alcaraz and
25 ///
26 ///

1 Frances S. Lewis, hereby files its trial memorandum for the trial of
2 defendant John Jacob Olivas.

3 Dated: November 26, 2021

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In 2011 and 2012, defendant John Jacob Olivas ("defendant") was a Special Agent with United States Immigration and Customs Enforcement ("ICE"), Homeland Security Investigations ("HSI"), formerly known as "ICE, Office of Investigations." Instead of using his badge, service firearm, and federal law enforcement power to better his community, however, defendant used his position and power for his own personal gratification: sexually abusing and attempting to sexually abuse two of his intimate partners and preventing them from reporting his sexual assaults, as well as other acts of violence, to law enforcement. Defendant's abuse of his federal law enforcement authority violated the victims' constitutional rights: namely, their rights to liberty and bodily integrity. For three specific sexual assaults and attempted sexual assaults of K.L. and N.B., defendant is charged with three counts of deprivation of rights under color of law, in violation of 18 U.S.C. § 242.

18 Defendant's charged sexual assaults were not, for example,
19 spontaneous acts of sexual aggression against strangers after
20 flashing his badge or against victims who simply had some passing
21 knowledge of defendant's status as a federal agent. Rather,
22 defendant's consistent and methodical reliance on his federal law
23 enforcement authority in his personal relationships were part of a
24 long trajectory of growing power over -- and expanding abuse of --
25 his intimate partners under color of law. K.L. had a romantic
26 relationship with defendant from approximately August 2011 to January
27 2012, during which defendant repeatedly exhibited escalating violent
28 and controlling behavior, including grabbing her by the head and

1 squeezing so hard she got black eyes. When she threatened to call
2 the police, he claimed he was the above local law enforcement and was
3 therefore "invisible"¹ and "untouchable." During another violent
4 episode, defendant threw his badge at her and refused to let her
5 leave because he was "Homeland Security." Defendant's violent
6 behavior toward K.L. culminated with his attempt to rape her in
7 January 2012 (Count 1) after K.L. no longer wanted to date defendant,
8 but was still too scared to report his conduct because of his claims
9 about his federal position and authority.

10 Within two months, defendant started a romantic relationship
11 with N.B. and the two lived together from approximately March 2012 to
12 November 2012, with communication and contact extending until early
13 2013. N.B. experienced defendant's same violent, escalating,
14 controlling, and intimidating behavior, which included his repeated
15 brandishing of HSI credentials to her and asserting that he was above
16 the law. Defendant raped N.B. in September 2012 (Count 2) after
17 earlier in the evening pulling his HSI-issued service weapon on her
18 and threatening to pull the trigger. In November 2012, defendant
19 raped N.B. again (Count 3). And just a few days after that, he
20 videotaped himself sodomizing her while she was sedated from a
21 sleeping pill and unable to consent to that sexual act.

22 **II. STATEMENT OF THE CHARGES**

23 Defendant is charged in the indictment with three counts of
24 deprivation of rights under color of law, in violation of 18 U.S.C.
25 § 242.

26

27 ¹ The government anticipates that K.L. will testify that
28 defendant used the word "invisible," but that K.L.'s testimony will
show the idea to which defendant referred was "invincibility."

1 In Count One, the United States alleges that between August 2011
2 to January 2012, in Riverside County, defendant, while acting under
3 color of law, willfully deprived victim K.L. of the right secured and
4 protected by the Constitution and laws of the United States to be
5 free from deprivations of liberty without due process of law, which
6 includes the right to bodily integrity. Specifically, in or about
7 January 2012, the United States alleges that defendant attempted to
8 engage in vaginal intercourse with K.L. without her consent and by
9 using force against her, after communicating to K.L. that the police
10 would not be responsive to any report she may make about defendant
11 because of his position as a federal law enforcement officer. This
12 offense included attempted aggravated sexual abuse.

13 In Count Two, the United States alleges that, between March 2012
14 and September 29, 2012, in Riverside County, defendant, while acting
15 under color of law, willfully deprived victim N.B. of the right
16 secured and protected by the Constitution and laws of the United
17 States to be free from deprivations of liberty without due process of
18 law, which includes the right of bodily integrity. Specifically, in
19 or about September 2012, the United States alleges that defendant
20 engaged in vaginal intercourse with N.B. without her consent and by
21 using force against N.B., after communicating to N.B. that the police
22 would not be responsive to any report she may make about defendant
23 because of his position as a federal law enforcement officer. This
24 offense included aggravated sexual abuse.

25 In Count Three, the United States further alleges that, between
26 September 30, 2012, and November 2012, in Riverside County,
27 defendant, while acting under color of law, willfully deprived N.B.
28 of the right secured and protected by the Constitution and the laws

1 of the United States to be free from deprivations of liberty without
2 due process of law, which includes the right to bodily integrity.
3 Specifically, on or about November 9, 2012, the United States alleges
4 that defendant engaged in vaginal intercourse with N.B. without her
5 consent and by using force against N.B., after communicating to N.B.
6 that the police would not be responsive to any report she may make
7 about defendant because of her position as a federal law enforcement
8 officer. This offense included aggravated sexual abuse.

9 **III. SCHEDULING MATTERS**

10 **A. The Government's Case-in-Chief**

11 Jury trial for defendant is set for Tuesday, November 30, 2021,
12 at 8:30 a.m. The government estimates five to eight days for its
13 case-in-chief, not including jury selection or cross-examination.

14 The government presently anticipates calling the following non-
15 custodial witnesses at trial, which are organized by type and listed
16 in alphabetical order:

17 1. Victims

18 a. R.A. (uncharged victim)

19 b. N.B. (charged victim)

20 c. K.L. (charged victim)

21 d. C.N. (formerly described as C.R.) (uncharged victim)

22 e. M.O. (formerly described as M.H.) (uncharged victim)

23 2. Civilian witnesses

24 a. D.B. (victim N.B.'s mother)

25 b. B.M. (victim N.B.'s friend)

26 c. I.T. (former Killarney's bar manager)

27 d. L.T. (victim N.B.'s friend)

28 3. Law enforcement

- 1 a. HSI Supervisor Special Agent David Guppenberger
- 2 b. Murrieta PD Detective Paul Johnson (forensics)
- 3 c. Former ICE OPR Lead Instructor Karen Martin
- 4 d. Former Riverside PD Detective Kevin Tutwiler
- 5 e. FBI Special Agent David Staab
- 6 f. FBI CART Forensic Analyst Jim Watkins (forensics)

7 4. Professionals and Experts

- 8 a. Dr. Prateek Jindal (treating physician)
- 9 b. Dr. Janine Shelby, Ph.D (noticed expert)
- 10 c. Dr. Jessie Rollins (treating physician)
- 11 d. Dr. Geisele Wudka (treating physician)

12 If the parties cannot reach an agreement, the government plans
13 to file a motion in limine to admit certain business records from
14 AT&T, Verizon, Sprint, Facebook, and Southern California Edison under
15 Federal Rules of Evidence 803(6) and 902(11) in lieu of calling those
16 custodians of record at trial.

17 **B. Potential Defense Case**

18 Defendant has not provided the government with notice that he
19 intends to rely on any affirmative defenses or present an affirmative
20 case. The government's unopposed motions to exclude Rule 412
21 evidence (dkt. 101) and good character evidence (dkt. 81) were
22 granted at the pretrial conference on November 22, 2021.

23 **IV. STATEMENT OF FACTS**

24 The evidence at trial will demonstrate the following:

25 **A. Defendant Deprived Victim K.L. of Her Right to Bodily
26 Integrity When Acting under Color of Law He Attempted to
27 Rape Her in January 2012**

28 Defendant and K.L. met and began dating in August 2011. From
the beginning, K.L. knew and understood -- because defendant made it

1 a point of emphasis -- not just that defendant was a federal agent,
2 but that his position gave him power over her and others. K.L. also
3 recalls defendant's temper and quick resort to violence. For
4 example, the government anticipates K.L. will testify about a time
5 the two attended a water park together where he referred to other
6 individuals in line as his confidential informants, and then used
7 them to cut the long line to gain entry to the park. Defendant then
8 proceeded to drink excessively, and, while drunk, drove K.L. home,
9 screaming at her the whole ride home. When the two entered K.L.'s
10 house, she locked herself in her bedroom because she was scared of
11 defendant.

12 After some time had passed that same day, when she thought
13 defendant had calmed down or left, she went out into her living room.
14 Defendant was waiting for her. He grabbed her by her head with both
15 hands and squeezed her face, giving her two black eyes. After K.L.
16 threatened to call the police, defendant told her that he was above
17 local law enforcement, that nothing could ever happen to him, and
18 that he was "invisible" to local law enforcement, i.e., invincible,
19 because of his status as a federal agent. Although K.L. had
20 originally intended to call the police, K.L. did not then call the
21 police because of defendant's comments that her efforts to report him
22 would be ignored. Despite defendant's abusive behavior, K.L.
23 remained in a relationship with defendant after this incident. The
24 government's noticed expert, Dr. Janine Shelby, Ph.D, is anticipated
25 to testify that women in abusive relationships frequently struggle to
26 leave or report violent conduct for a host of reasons, including fear
27 of their abuser and the hope that the person will change.

1 During the remainder of their relationship, defendant continued
2 to abuse K.L. physically and, for example, threaten her with arrest.
3 Defendant would choke K.L. to the point that she would have lasting
4 red marks, grab her arms to the point where she would bruise, and
5 throw her against walls. K.L. has photographs of bruises to her
6 arms, face, and neck from defendant's violent acts. Although she
7 does not recall the exact date they were taken, K.L. is anticipated
8 to testify that she started documenting these physical abuses after
9 defendant said he could make her "disappear" and she believed him.
10 When she would threaten to call the police, defendant would return to
11 his time-tested routine of telling her that he was above the local
12 police, it would be his word against hers, and the local police would
13 believe him over her because he was a federal agent. He also told
14 her that that he could get her arrested and that the arrest would
15 result in K.L. losing custody of her children.

16 At other times, as noted, when trying to control her behavior,
17 defendant told K.L. that he could make her "disappear." Relatedly,
18 when out in public, at the Riverside bar Killarney's, for example, he
19 would tell her that some particular person was in fact his informant
20 and that defendant looked out for the informant and the informant
21 helped defendant. K.L. believed that informants were criminals who
22 would assist law enforcement in return for not being sent to jail.
23 Defendant would also routinely tell K.L. that he could access a
24 person's Facebook account through his work, and that defendant also
25 monitored his ex-wife R.A.'s electronic communications through work,
26 and that he could track K.L.'s phone using his phone. K.L. believed
27 defendant could and was accessing her social media because of his
28 position as a federal agent.

1 On K.L.'s birthday in December 2011, she and some friends went
2 dancing with defendant at Killarney's bar in Riverside. Defendant
3 accused K.L. of dancing with other men and then dragged her out by
4 her arm as K.L. screamed. Despite K.L.'s protect, the security at
5 the bar did not help her, adding to her belief that because of
6 defendant's law enforcement status, he could abuse her with impunity.
7 Defendant threw her into his car. Defendant drove her back to his
8 house in Riverside. Once back at defendant's house, K.L. tried to
9 get into her car and leave. Defendant threw his HSI-badge at her,
10 told her that he was "Homeland Security," and refused to move his
11 car, which was parked behind hers. Eventually defendant relented and
12 allowed her to leave.

13 In or about January 2012, defendant attempted to rape K.L. while
14 the two of them were at defendant's residence and after she had made
15 it clear to defendant that they were just friends and no longer had a
16 romantic relationship. While watching a movie, defendant repeatedly
17 tried to kiss K.L., and she told him he was not abiding by her
18 request that they not have any physical contact. Defendant tried to
19 put his hand up K.L.'s shirt and tried to take off her pants.
20 Eventually, defendant held her down by the shoulders, using his body
21 weight and strength, and tried to have sex with her. K.L.
22 emphatically told defendant that she did not want to have sex with
23 him, but defendant kept holding her down. K.L. began screaming, but
24 defendant persisted. It was not until K.L. began kicking defendant
25 in his stomach area and screaming for help that he relented. After
26 this incident, K.L. did not want any more contact with defendant.
27 She, however, did not report the attempted rape or defendant's
28 abusive conduct toward her to the police. Based on defendant's past

1 statements about his position as a federal agent, K.L. felt the
2 police would not help her.

3 **B. Defendant Deprived Victim N.B. of Her Right to Bodily
4 Integrity When Acting under Color of Law He Raped Her in
September and November 2012**

5 Just a few months after attempting to rape K.L., defendant began
6 a relationship with N.B. in March 2012. On their first date,
7 defendant identified himself as a federal agent and showed his
8 official credentials to her, his firearm, and his department-issued
9 tactical vest and other agency-issued equipment in the back seat of
10 his car. Throughout their relationship, N.B. would see defendant use
11 his credentials to get special treatment. Any time they went out,
12 defendant was armed with his HSI-issued service weapon on his waist.
13 He would often use his credentials and the fact that he had a weapon
14 to get special parking at venues or cut the line at local bars and
15 clubs.²

16 N.B. moved into defendant's home in Riverside very quickly and
17 it took only a few weeks for defendant to become physically abusive.
18 Defendant would throw objects at N.B., physically restrain her by
19 pinning her against walls, pull her hair, and choke her to the point
20 where she would nearly pass out. As with K.L., defendant used his
21 position as a federal agent to intimidate N.B. into not reporting any
22 of his physical and sexual attacks to law enforcement officials.

23 After physical attacks, defendant would tell N.B. that the
24 police would not believe her word over his. He would also tell her
25

26 ² I.T., the bar manager at Killarney's during this time period,
27 is expected to corroborate N.B.'s testimony by describing multiple
28 incidents where defendant would use his badge to gain entry to the
bar, including asking if he (defendant) could place his gun in the
Killarney's safe. Defendant would also ask I.T. to tell other
patrons at Killarney's about defendant's status as a federal agent.

1 that he was "well-connected" to Riverside Police Department ("RPD")
2 management and, as a Special Agent, he had more authority than local
3 police officers. For example, after one particularly violent episode
4 on October 5, 2012, N.B. called a longtime mentor of hers, L.T.,
5 crying hysterically that defendant had just choked her and would not
6 let her leave. L.T. asked to speak to defendant, and not wanting to
7 make the situation worse, simply urged him to let N.B. leave the
8 house. Defendant continued to refuse -- telling L.T. that he was a
9 federal agent and that he had the situation under control. L.T. is
10 expected to testify that defendant's statements to her appeared to
11 try and influence L.T. to ignore N.B.'s plea for help.

12 As early as May 2012, N.B. had seen enough violence that she
13 would want to call the police. Defendant, however, told N.B. that if
14 she did, he would also call and tell them ignore any complaints from
15 his residence. Defendant would sometimes take it a step farther and
16 even pretend to call "Sector" (HSI's version of a watch commander) in
17 front of N.B. and ask to be connected to the RPD watch commander. He
18 would then get a call back from someone N.B. believed to be an RPD
19 sergeant. Defendant once even threatened to send a confidential
20 informant ("CI") to N.B.'s house to "put [her] in a hospital." In
21 August 2012, N.B. managed to record one such incident of defendant
22 threatening to send a "CI snitch" to beat her up if she ever cheated
23 him. Defendant's threatened use of a CI was intended to influence
24 N.B. during a purely personal, and non-HSI related, incident. N.B.
25 believed defendant's flaunting of his authority as a federal agent
26 and connection to local law enforcement was to discourage her from
27 reporting instances of physical and sexual abuse to the police.

28

1 The first rape, which is charged as Count 2, occurred in late
2 September 2012, shortly after defendant held his HSI-issued gun to
3 N.B.'s head. Specifically, after a night of drinking at a local bar,
4 defendant became enraged when he perceived men outside the bar to be
5 catcalling N.B. Sitting in the passenger's seat while N.B. was
6 driving, he pulled his HSI-issued service pistol and put its muzzle
7 to N.B.'s head. He asked her, "What would you do if I pulled the
8 trigger?" After they arrived home, defendant shoved N.B. to the
9 ground of the living room. When N.B. tried to get up off the floor
10 and away from defendant, he began dragging her around the carpet,
11 rubbing raw the skin on her arm and causing it to bleed. He then
12 flipped her over, ripped her pants off, and forcefully raped her
13 despite N.B. emphatically telling defendant that she did not want to
14 have sex with him. Defendant yelled at N.B. for bleeding on his
15 carpet and continued to rape her. Defendant's service pistol was on
16 a table directly above N.B.'s head within defendant's reach and
17 N.B.'s view. N.B. did not report this rape to law enforcement
18 because defendant had led N.B. to believe that law enforcement would
19 protect defendant and defendant would retaliate against her for
20 reporting him.

21 On or about November 3, 2012, after N.B. told defendant that she
22 wanted to end their relationship, defendant became enraged and began
23 destroying N.B.'s personal property, pointed his loaded HSI-issued
24 gun at N.B.'s head with his finger on the trigger, pointed the gun
25 also at his mother, and dropped the gun only after his father
26
27
28

1 intervened.³ On November 4, 2012, defendant physically restrained
2 N.B. to prevent her from leaving his house. Defendant wrapped his
3 arms around her body with enough force that her ribs fractured, then
4 he denied her request to receive medical care.⁴ A few days later,
5 N.B. finally persuaded defendant to allow her to seek medical
6 attention so long as she promised not to report any of his conduct
7 and describe it as an accident. On November 6, 2012, N.B. was
8 treated by Dr. Jindal of Riverside Urgent Care, and then again on
9 November 8, 2012, by Dr. Rollins. N.B. was placed in a restrictive
10 medical binder that wrapped around her rib cage.

11 Defendant raped N.B. again on or about November 9, 2012, just a
12 few days after defendant fractured N.B.'s ribs by grabbing and
13 squeezing her. Defendant wanted to have sex, but N.B.'s ribs hurt
14 too much so she told him no. She eventually relented and agreed to
15 try having sex, so long as defendant promised that if it hurt at all
16 they would stop. But once they began having vaginal intercourse and
17 N.B. asked him to stop because of the pain, he refused, and persisted
18 with having sex with her. His body was too heavy for her to get out
19

20 ³ In connection with this conduct, defendant was charged with
21 and pleaded guilty to (1) assault with a gun against his father in
22 violation of California Penal Code ("CPC") § 245(a)(2);
23 (2) infliction of corporal injury resulting in a traumatic condition
upon a cohabitant, N.B., in violation of CPC § 273.5(a); and
24 (3) witness tampering in violation of CPC § 136.1(b)(1) in Riverside
County Superior Court, Case No. 327926. As part of defendant's
agreement with the State of California, the witness tampering charge
was dismissed at sentencing, and defendant was convicted of the first
two offenses.

25 ⁴ The government's motion in limine no. 1 incorrectly suggested
26 that defendant's domestic violence conviction related to both the
November 3, 2012, gun incident and the November 4, 2012, bear hug
27 incident. The government's best understanding of the state court
records is that defendant's conviction was for his conduct on
28 November 3, 2012, against N.B. and his father, and not the bear hug
believed to take place a day or so later.

1 from under him, and defendant's service firearm was on the dresser
2 next to the bed where he raped her. It was within defendant's easy
3 reach and N.B.'s clear view. N.B. did not report this rape to law
4 enforcement because defendant had led N.B. to believe that law
5 enforcement would protect defendant and that defendant would
6 retaliate against her for reporting him.

7 Shortly after this rape, on an unknown date but believed to be
8 around November 12, 2012, defendant videotaped himself having anal
9 sex with a lethargic N.B. who was unable to consent. What N.B.
10 recalls is that she took Ambien as a sleeping aid, as she had
11 routinely done during her relationship with defendant and which, as
12 he knew, caused her to be largely incapacitated. N.B. does not
13 remember the actual attack due to her sedation, but does recall
14 waking up the next morning with no panties on (after having gone to
15 bed wearing them) and bleeding from her anus. She also does remember
16 what defendant did afterwards: when she threatened to report him to
17 the police after their relationship ended in March 2013, defendant
18 sent the video to her cell phone, which she kept, that shows him
19 sodomizing her while she is only semi-conscious. In the video, N.B.
20 appears only partially awake, with her eyes open but droopy and
21 making very slurred and largely unintelligible sounds as well as
22 providing some limited responses to defendant.

23 N.B. ended her relationship with defendant over Thanksgiving of
24 November 2012, although they maintained some contact for months.
25 N.B. told defendant that she was going to stay at her parents' house
26 for the holiday, and then finally moved out, returning only a handful
27 of times to get her stuff. Defendant's threats and comments
28 regarding his power and position contributed to N.B.'s increasing

1 fear of him. She believed that defendant was above the law,
2 "invincible" to the criminal justice system, and well-positioned to
3 physically retaliate against her if she reported his abuse to law
4 enforcement. To this day, N.B. remains extremely afraid of
5 retaliation from defendant. Defendant sexually assaulted N.B. at
6 least three times, two of which are charged in the indictment.

7 **C. Defendant Acted Willfully**

8 As will be clear from K.L. and N.B.'s testimony, defendant's
9 acts of sexual aggression were not accidents or misunderstandings,
10 nor were they consensual acts to one party but not the other. Even
11 before defendant had the enormous power bestowed upon him by virtue
12 of his status as a federal agent, defendant had a long history of
13 taking what he wanted from women sexually. Defendant's first wife,
14 C.N. (formerly C.R.) married defendant in 2000. During the course of
15 their romantic relationship, defendant raped C.N. twice. Once, in
16 1999, defendant sexually assaulted C.R. at her mother's house.
17 Defendant held C.N. down, treated her very roughly, and raped her.
18 After moving to Fort Bragg, North Carolina, defendant sexually
19 assaulted C.N. again. C.N. was sleeping when defendant entered the
20 bedroom and woke C.N. wanting to have sex. C.N. refused, but he
21 forced himself on her anyway and raped her.

22 R.A. first met defendant when they both were college students in
23 1996, but they did not start dating until approximately 2003.
24 Defendant and R.A. got married in February 2004, but by August 2004,
25 the relationship deteriorated and defendant moved out of their shared
26 residence that August. When defendant moved out, R.A. was pregnant
27 with their son to whom she gave birth in October 2004.

28

1 In mid-November 2004, defendant raped R.A., just a few weeks
2 after she gave birth to their son via cesarean section. After
3 spending the first few post-partum weeks at her mother's house, R.A.
4 had moved back into the apartment she previously shared with
5 defendant. One day, defendant broke into the apartment while R.A.
6 was finishing taking a shower. He told her he wanted to get back
7 together and to be with her, and when she refused, he forcibly raped
8 her on the floor, while she still had stitches from her cesarean
9 section, and just feet away from the crib holding their infant child.
10 R.A. never reported the rape out of fear of reprisal from defendant
11 and the stigma associated with being a sexual assault victim. R.A.
12 also waited over three years, until December 2007, to file for
13 divorce because she was terrified of how defendant might react.

14 **D. Defendant Acted under Color of Law**

15 The evidence at trial will also establish that defendant fully
16 understood that was abusing power possessed by virtue of law and made
17 possible only because he was clothed with the authority of law when
18 committing these offenses and was not merely pursuing a personal
19 pursuit. In addition to K.L.'s and N.B.'s testimony about how
20 defendant used his badge and firearm in front of them to get what he
21 wanted, the government also plans to present testimony from HSI
22 employees about the nature and scope of defendant's responsibilities
23 with HSI. This testimony will include information about specific
24 trainings defendant received on when and how it was appropriate to
25 use a badge or firearm, including that it would not be appropriate to
26 use these items for personal reasons, including while drinking, or to
27 obtain special privileges.

1 Defendant also used his position as a federal law enforcement
2 officer to discourage and dissuade his most recent wife, M.O.
3 (previously described as M.H.), from reporting his abuse against her
4 to the police. M.O. is expected to testify as to a specific instance
5 in 2013 when M.O. wanted to leave defendant's house, and defendant
6 refused to let her go. Defendant then pretended to call the RPD in
7 front of M.O. and requested that the police disregard any calls for
8 assistance from their residence that might be made that day.
9 Although M.O. understands now that defendant did not in fact call the
10 RPD that day, at the time she genuinely believed he did, that he was
11 not joking, and that he had the power and authority to influence
12 local law enforcement.

13 **V. ELEMENTS OF THE CHARGES -- 18 U.S.C. § 242**

14 All three counts charge defendant with deprivation of rights
15 under color of law. In order for defendant to be found guilty of
16 this charge, the government must prove beyond a reasonable doubt:

17 1. The defendant deprived the person named in the indictment
18 of a right secured and protected by the Constitution or laws of the
19 United States;

20 2. The defendant acted willfully, specifically intending to
21 deprive the individual of that right;

22 3. The defendant acted under color of law; and

23 4. The victims were present in the State of California.

24 18 U.S.C. § 242; 5th Cir. Pattern Crim. Inst. No. 2.12 (2019)

25 [Deprivation of Civil Rights] (modified); 7th Cir. Pattern Crim.
26 Inst. No. 18 U.S.C. § 242 (2012) [Elements].

27 **A. The Right to Bodily Integrity**

28 The first element requires the government to prove that

1 defendant deprived the person named in that count of a right secured
2 or protected by the Constitution or laws of the United States.
3 Specifically, the indictment alleges the right at issue is K.L.'s and
4 N.B.'s right to bodily integrity, which is a right protected by the
5 Fourth and Fifth Amendments of the United States Constitution. See,
6 e.g., United States v. Gonzalez, 533 F.3d 1057, 1064 (9th Cir. 2008)
7 ("Included in the liberty protected by the Fourteenth Amendment is
8 the concept of personal bodily integrity and specifically the right
9 to be free from certain sexually motivated physical assaults and
10 coerced sexual battery.") (emphasis added) (citing United States v.
11 Lanier, 520 U.S. 259, 262 (1997)).

12 The right to bodily integrity includes the right to be free from
13 nonconsensual sexual acts with someone acting under color of law. A
14 sexual act is nonconsensual if it is done without the free and
15 voluntary consent of the victim. A nonconsensual sexual act occurs
16 when the defendant used physical force or the threat of physical
17 force, or if the defendant used official intimidation to coerce a
18 sexual act. United States v. Shaw, 891 F.3d 441, 448-50 (3d Cir.
19 2018) (streamlined) ("[S]exual abuse," as compared to aggravated
20 sexual abuse, "encompasses the use of . . . fear-inducing coercion
21 to overcome the victim's will.").

22 In evaluating whether a nonconsensual sexual act occurred, the
23 jury should consider all of the circumstances, including the context
24 in which the alleged incident occurred, the relationship between the
25 defendant and the victim, the relative positions of power and
26 authority between the defendant and the victim, any disparity in size
27 between the defendant and the victim, and any use of physical or
28 mental coercion. In determining whether a deprivation occurred, the

1 jury is free to consider "the coercive power, physical and
2 psychological, that [the defendant] may have possessed by virtue of
3 that disparity in size and by virtue of the office he held." United
4 States v. Webb, 214 F.3d 962, 963-64 (8th Cir. 2000) (affirming
5 conviction of sheriff's deputy for § 242 violation).

6 **B. Willfully**

7 The second element addresses the defendant's intent and requires
8 the government to prove that defendant acted willfully. To act
9 willfully means to act voluntarily and deliberately, with the
10 specific intent to deprive the person named in Counts One, Two, or
11 Three of a Constitutional right, namely, the right to bodily
12 integrity. The defendant does not have to know or recognize that his
13 acts are illegal or unconstitutional. United States v. Reese, 2 F.3d
14 870, 836 (9th Cir. 1993) ("There is no requirement under section 241
15 [or 242] that a defendant recognize the unlawfulness of his acts.")
16 (alteration in original).

17 Reckless disregard of a person's established constitutional
18 rights is evidence of a specific intent to deprive that person of
19 those rights. Reese, 2 F.3d at 881 ("To 'act willfully in the sense
20 in which we use the word is to act in open defiance or reckless
21 disregard of a constitutional requirement that has been made specific
22 and definite.'") (quoting Screws v. United States, 325 U.S. 91, 105
23 (1945) (emphasis in original)); Reese v. County of Sacramento, 888
24 F.3d 1030, 1045 (9th Cir. 2018) ("[I]t is not necessary for the
25 defendants to have been 'thinking in constitutional or legal terms at
26 the time of the incidents, because a reckless disregard for a
27 person's constitutional rights is evidence of a specific intent to
28 deprive that person of those rights.'" (emphasis omitted)); United

1 States v. Johnstone, 107 F.3d 200, 208 (3d Cir. 1997) ("[W]illfulness
2 includes reckless disregard.").

3 **C. Color of Law**

4 The third element requires the government to prove defendant
5 acted under color of law. A person acts under "color of law" when he
6 acts in his official capacity or purports or claims to act in his
7 official capacity. Action under color of law includes the abuse or
8 misuse of the power possessed by the defendant by virtue of his
9 office or official position. United States v. Classic, 313 U.S. 299,
10 325 (1941) ("Misuse of power, possessed by virtue of state law and
11 made possible only because the wrongdoer is clothed with authority of
12 state law, is action taken 'under color of state law.'").

13 Officers pursuing their personal pursuits do not act under color
14 of law merely because they are officers. However, whether an officer
15 is acting under color of law does not depend on duty status at the
16 time of the offense. Anderson v. Warner, 451 F.3d 1063, 1068 (9th
17 Cir. 2006) ("[W]hether an officer is acting under color of state law
18 turns on the nature and circumstances of the officer's conduct and
19 the relationship of that conduct to the performance of his official
20 duties." (streamlined)); United States v. Giordano, 442 F.3d 30, 47
21 (2d Cir. 2006) (holding mayor acted under color of law during
22 protracted private relationship with prostitute); United States v.
23 Tarpley, 945 F.2d 806, 809 (5th Cir. 1991) (holding duty status
24 irrelevant).

25 To find that the defendant acted under color of law, the jury
26 must find that he committed the offense by using or abusing power
27 possessed by virtue of law and made possible only because he was
28 clothed with the authority of law. West v. Atkins, 487 U.S. 42, 48

1 (2000) ("The traditional definition of acting under color of state
 2 law requires that the defendant . . . have exercised power 'possessed
 3 by virtue of state law and made possible only because the wrongdoer
 4 is clothed with the authority of state law.'"); Screws v. United
 5 States, 325 U.S. 91, 111 (1945) (stating that "under 'color' of law
 6 means under 'pretense' of law" and distinguishing between "acts of
 7 officers in the ambit of their personal pursuits"--which are
 8 excluded--and "[a]cts of officers who undertake to perform their
 9 official duties whether they hew to the line of their authority or
 10 overstep it"--which are included).

11 "There is no 'rigid formula' for determining whether a state or
 12 local law official is acting under color of law." Anderson, 451 F.3d
 13 at 1068. The Ninth Circuit has identified three requirements that
 14 guided its analysis in those circumstances. First, the defendant
 15 "pretended to act in the performance of his official duties." Id. at
 16 1069. Second, the defendant's "pretense of acting in the performance
 17 of his duties . . . had the purpose and effect of influencing the
 18 behavior of others." Id. Third, the defendant's conduct was
 19 "sufficiently related either to the officer's governmental status or
 20 to the performance of his official duties." Id. (quotation omitted).

21 The Ninth Circuit has explained that the third requirement
 22 "cannot mean that an officer must have been acting within the scope
 23 of his authority in order for him to have been acting under color of
 24 state law." Id. "If that were true," no civil rights claim or
 25 prosecution "could ever succeed" because the underlying premise "is
 26 that the officer acted illegally--that is, outside the scope of his
 27 authority." Id. Accordingly, in Anderson, as here, the "third
 28 requirement means that [the defendant] must have used the badge of

1 his authority to deprive an individual of his rights by invoking his
2 governmental status to influence the behavior of those around him.”
3 Id. (streamlined).

4 In Giordano, the Second Circuit affirmed a § 242 conviction
5 against a mayor who was sexually abusing minors where he “threatened
6 his victims by invoking a ‘special authority’ to undertake
7 retaliatory action,” and “he used his authority to cause the victims
8 to submit to repeated abuse, in this case by causing the victims to
9 fear that he would use his power to harm them if they reported the
10 abuse.” 442 F.3d at 45. There, as here, the victims believed --
11 because defendant wanted them to believe -- that “he had a lot to do
12 with the police” and had “control” over the police, repeatedly
13 invoking “the real or apparent power of his office to make the
14 continuing sexual abuse possible.” Id. (streamlined). There, as
15 here, defendant acted under color of law because his “misuse of
16 official power made the commission of a constitutional wrong
17 possible, even though the official committed abusive acts for
18 personal reasons far removed from the scope of official duties.” Id.
19 (emphasis added).

20 **D. Aggravated Sexual Abuse**

21 Should the jury find the elements for a § 242 violation have
22 been met, it will then be required to determine for each count
23 whether defendant’s conduct constituted aggravated sexual abuse, as
24 charged for victim N.B. (counts two and three), or attempted
25 aggravated sexual abuse, as charged for victim K.L. If the jury
26 finds that defendant committed aggravated sexual abuse, or attempted
27 to do so, the defendant’s crime is a felony. Should the jury find
28

1 only that defendant committed sexual abuse, not aggravated sexual
2 abuse, the defendant's crime is a misdemeanor.

3 A person commits "aggravated sexual abuse" if he knowingly used
4 force to cause another person to engage in a sexual act. The term
5 "sexual act" means contact between the penis and the vulva, including
6 vaginal intercourse.

7 A person commits attempted aggravated sexual abuse if he
8 intended to use force to cause a person to engage in a sexual act;
9 and (2) does something that was a substantial step toward committing
10 the crime and that strongly corroborated the defendant's intent to
11 commit the crime unanimously as to which particular act or actions
12 constituted a substantial step toward the commission of a crime. 18
13 U.S.C. §§ 242, 2241, 2246; 9th Cir. Mod. Crim. Inst. No. 8.164
14 [Aggravated Sexual Abuse], 8.165 [Attempted Aggravated Sexual Abuse]
15 (2010). United States v. Shaw, 891 F.3d 441, 450 (3d Cir. 2018)
16 (distinguishing unwanted sexual conduct from aggravated sexual
17 abuse); Cates v. United States, 882 F.3d 731, 733 (7th Cir. 2018)
18 ("[A]ggrevated sexual abuse is knowingly causing another person to
19 engage in a sex act by 'using force against that other person.'").

20 **VI. LEGAL AND EVIDENTIARY ISSUES**

21 The government has attempted to meet and confer with defendant
22 about the following possible legal and evidentiary issues at trial,
23 but has been unable to get a hold of defense counsel following the
24 pretrial counsel on Monday, November 22, 2021, despite repeated
25 overtures by email and phone.

26 **A. Defendant's Prior Statements**

27 The government intends to admit several statements by defendant
28 from various sources in this case, including, for example, statements

1 he made to victims K.L. and N.B. during their relationships, text
2 messages he sent to N.B., and statements he made to Riverside PD
3 Detective Tutwiler during a recorded telephone interview.

4 Statements by a party opponent when offered against that party
5 are excluded from the hearsay definition. Fed. R. Evid.
6 801(d)(2)(A). Thus, each of defendant's own statements may be
7 admitted against him. When the government offers some of a
8 defendant's prior statements, the door is not thereby opened to the
9 defendant to put in all of his out-of-court statements because, when
10 offered by the defendant, the statements are hearsay. See Fed. R.
11 Evid. 801(d)(2); United States v. Burreson, 643 F.2d 1344, 1349 (9th
12 Cir. 1981); United States v. Fernandez, 839 F.2d 639, 640 (9th Cir.
13 1988). Accordingly, any exculpatory statements made by a defendant
14 are hearsay and are not admissible at trial, when offered by that
15 defendant. See Fed. R. Evid. 801(d), 802; United States v. Ortega,
16 203 F.3d 675, 682 (9th Cir. 2000).

17 The only recognized limitation of this principle is the
18 "doctrine of completeness," which has been applied by some courts to
19 admit additional portions of a defendant's prior statements where
20 necessary to explain an admitted statement, place it in context, or
21 avoid misleading the trier of fact. See Fed. R. Evid. 106; Burreson,
22 643 F.2d at 1349. However, the completeness doctrine does not
23 require introduction of portions of a statement that are neither
24 explanatory of, nor relevant to, the admitted passages. United
25 States v. Mitchell, 502 F.3d 931, 965 (9th Cir. 2007); United States
26 v. Collicott, 92 F.3d 973, 983 (9th Cir. 1996) (holding that Federal
27 Rule of Evidence 106 does not compel admission of otherwise
28 inadmissible hearsay evidence); see also United States v. Lopez-

1 Figueroa, 316 F. App'x 548, 550 (9th Cir. 2008) (defendant could not
2 introduce own statements redacted from confession by government). As
3 the Ninth Circuit has recognized, "it is often perfectly proper to
4 admit segments . . . without including everything, and adverse
5 parties are not entitled to offer additional segments just because
6 they are there and the proponent has not offered them." Collicott,
7 92 F.3d at 983. Defendant has not identified any additional
8 statements that he maintains must be introduced under the doctrine of
9 completeness.

10 **B. Statements to Defendant**

11 The government intends to introduce statements of people in
12 conversation with the defendant, including statements by N.B. in text
13 message conversations with defendant. Unless otherwise noted, these
14 statements are not offered for their truth, but to provide context
15 for what the defendant said or did, and thus, are not hearsay. Fed.
16 R. Evid. 801(c); see also United States v. Valerio, 441 F.3d 837, 844
17 (9th Cir. 2006) (informant's statements on a recording are admissible
18 to give context to defendant's statements).

19 For similar reasons, the victim's statements to defendant (or
20 statements made by others to defendant, such as witnesses L.T. and
21 I.T.) may be offered not for their truth but for the effect they have
22 on the hearer (e.g., to show a party's knowledge). These statements
23 are also not hearsay in such contexts. United States v. Castro, 887
24 F.2d 998, 1000 (9th Cir. 1987); Orsini v. O/S Seabrooke O.N., 247
25 F.3d 953, 960 n.4 (9th Cir. 2001). A witness also may testify to
26 what he or she understood a declarant to mean with respect to a
27 statement made by the declarant to the witness. United States v.
28 Brooks, 473 F.2d 817, 818 (9th Cir. 1973) (per curiam).

1 Additionally, some of the victims' statements may further
2 qualify under other hearsay exceptions, such as their statements to
3 the defendant during his assaults reflecting pain or lack of consent.
4 See, e.g., Fed. R. Evid. 803(1) (defining "present sense impression"
5 as one made "while the declarant was perceiving the event or
6 condition"); Fed. R. Evid. 803(2) (defining an "excited utterance" as
7 a "statement relating to a startling event or condition, made while
8 the declarant was under the stress of excitement that it caused");
9 Fed. R. Evid. 803(3) (hearsay exception for a "then-existing mental,
10 emotional, or physical condition" where the statement reflects the
11 declarant's "then-existing state of mind (such as motive, intent, or
12 plan) or emotional, sensory, or physical condition (such as mental
13 feeling, pain, or bodily health)").

14 **C. Medical Evidence and Testimony**

15 The government intends to introduce certain medical records of
16 victim N.B. to corroborate her testimony that defendant was abusive
17 to her. Specifically, the government intends to introduce records
18 from the Riverside Urgent Care center in November 2012 reflecting
19 that N.B. sustained injuries after reporting that her boyfriend
20 "hugged" her. The government may also include records from a
21 longtime physician of N.B. with UCLA Health that she provided N.B.
22 with counseling on abusive relationships.

23 These medical records are admissible under Federal Rule of
24 Evidence 803(4), which provides that any statement that describes the
25 general cause of a declarant's medical symptoms or conditions
26 constitutes an exception to the hearsay rule. "Statements as to
27 fault" are generally not admissible as non-hearsay statements under
28 Rule 803(4), except in certain sexual abuse cases. United States v.

1 Yazzie, 59 F.3d 807, 812 (9th Cir. 1995). Here, however, N.B.'s
2 identification of defendant as the source of her injury was "made for
3 -- and [] reasonably pertinent to -- medical diagnoses or treatment,"
4 since it was necessary to explain her reasons for treatment that day.
5 Rule 803(3)(4). Therefore, it is admissible.

6 In the event the parties are unable to stipulate as to the
7 admissibility of the underlying medical records in this case, the
8 government plans to call the treating physicians to introduce the
9 records. The Ninth Circuit has held that a treating physician need
10 not be designated as an expert where "he could testify to matters
11 rationally based on upon his perception." Hoffman v. Lee, 474 F.
12 App'x 503, 505 (9th Cir. 2012); see also Fed. R. Evid. 701(a) ("If a
13 witness is not testifying as an expert, testimony in the form of an
14 opinion is limited to one that is . . . rationally based on the
15 witness's perception."); United States v. Steele, No. 2:10-CR-148-
16 BLW, 2011 WL 841386 (D. Idaho) ("Treating physicians may obviously
17 testify concerning the diagnosis made, the course of
18 treatment provided, the prognosis anticipated, and the consequences
19 of treatment likely to be encountered. However, they do so, not as
20 expert witnesses, but as fact witnesses who are describing the nature
and course of treatment actually provided to the [patient].").

22 **D. Victim's Prior Consistent Statements**

23 Prior consistent statements of a testifying witness may be
24 admissible either to rebut an express or implied charge of recent
25 fabrication or to rehabilitate a witness whose credibility has been
26 attacked on another ground, such as faulty memory. Both
27 circumstances are likely to apply here depending on defendant's
28 cross-examinations of the witnesses in this case.

Under Federal Rule of Evidence 801(d)(1)(B)(i), an out-of-court statement is not hearsay if the declarant testifies at the trial and is subject to cross-examination concerning the statement, and the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Rule 801(d)(1)(B)(i); see United States v. Bao, 189 F.3d 860, 864 (9th Cir. 1999); United States v. Frederick, 78 F.3d 1370, 1377 (9th Cir. 1996); United States v. Stuart, 718 F.2d 931, 934 (9th Cir. 1983). However, "[p]rior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because [the witness] has been discredited The Rule speaks of a party rebutting an alleged motive, not bolstering the veracity of the story told." Tome v. United States, 513 U.S. 150, 157-58 (1995). For example, in Tome, the Supreme Court held "that prior consistent statements made after the date of the alleged motivation to lie are inadmissible." Frederick, 78 F.3d at 1377; see Tome, 513 U.S. at 167.

To establish the admissibility of a prior consistent statement under Rule 801(d)(1)(B)(i), the following foundational factors must be satisfied: "(1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose." Collicott, 92 F.3d at 979. It is unclear what

1 accusations defendant will levy on cross-examination of the victims
2 regarding the basis of an alleged motive to fabricate, but whatever
3 motive is claimed, the government on redirect should be entitled to
4 introduce the victim's consistent statements that pre-date that
5 alleged motive under Rule 801(d)(1)(B)(i).⁵

6 If a witness's testimony is attacked on another ground, such as
7 an allegation of faulty memory, that witness's prior consistent
8 statements should also be admitted under Rule 801(d)(1)(B)(ii). This
9 second clause permits the introduction of "consistent statements that
10 are probative to explain what otherwise appears to be an
11 inconsistency in the witness's testimony" and "consistent statements
12 that would be probative to rebut a charge of faulty memory." Fed. R.
13 Evid. 801, Adv. Comm. Notes to 2014 Amendments. "The intent of the
14 amendment [wa]s to extend substantive effect to consistent statements
15 that rebut other attacks on a witness -- such as charges of
16 inconsistency or faulty memory." Id.; see also United States. v.
17 Ledbetter, 184 F. Supp. 3d 594, 598-601 (S.D. Ohio 2106); Berry v.
18 Beauvais, No. 12-cv-26470-WJM-CBS, 2015 WL 5244892, at *2 (D. Colo.
19 Sept. 9, 2015) ("The committee saw that the Rule, as originally
20 written, left these sorts of prior consistent statements potentially
21 admissible only for the limited purpose of rehabilitating a witness's
22 credibility, not as substantive evidence. Clause (ii) clarifies that
23 such statements may be treated as substantive evidence [too]."
24 (quotation omitted)).

25

26

27 ⁵ For example, defendant has previously claimed that victim N.B.
28 was motivated to lie after his marriage to M.O. in 2013. If N.B.'s
credibility is attacked on this ground, N.B.'s consistent statements
pre-dating that marriage should be admitted on redirect.

1 If defendant attacks the victims' credibility on cross-
2 examination by suggesting that the victim's memories may have faded,
3 the government intends to introduce the victim's prior consistent
4 statements under Rule 801(d) (1)(B) (ii).

5 **E. Scope of Cross-Examination into Witnesses R.A., C.N., and**
M.O. (the Uncharged Victims)

7 At the pretrial conference on November 15, 2021, the Court
8 partially granted and partially denied the government's motion to
9 admit certain evidence under Rule 413 and 404(b). Specifically, the
10 Court held that the government could call defendant's prior wives
11 R.A. and C.N. (previously identified as C.R.) for the limited purpose
12 of describing defendant's sexual assaults of these two women under
13 Rule 413. The Court also ruled that defendant's most recent wife,
14 M.O. (previously identified as M.H.), could testify only as to one
15 specific act under Rule 404(b): defendant's feigned call to the
16 Riverside PD in front of her when she threatened to leave.

17 On direct examination of these witnesses, the government
18 therefore intends to inquire only into these specific acts and to
19 provide brief, but sufficient testimony, that the victims knew
20 defendant and were in relationships with him. The witnesses are
21 expected to say generally that there were problems in the
22 relationship to provide context for the assaults, but the government
23 plans to ask questions that avoid eliciting specific information
24 about the nature of those problems on direct. For example, as this
25 Court is aware, defendant committed multiple acts of violence against
26 each of these women and all three have had custody disputes with
27 defendant, all of which explains why they never reported his conduct
28 until now.

The government anticipates that defendant will attempt to cross-examine these witnesses about their custody disputes with defendant in an effort to establish bias against him.⁶ Defendant will also likely suggest that these women must be lying because they waited several years to come forward. The government intends to object to such topics of cross-examination as irrelevant, but recognizes the Court has broad discretion to permit questioning related to a witness's bias or memory. However, if defendant is permitted to cross-examine these witnesses on such grounds -- i.e., the existence of the custody disputes with defendant or their delayed reporting -- the jury should not be left with the mistaken impression that these witnesses only had one single negative experience with defendant that they are just now coming forward with years after the fact.

Depending on the cross-examination of these witnesses, the government must be allowed to rebut any false impression created by such questions. R.A., C.N., and M.O. each have long and sad stories about the violence they experience at defendant's hands that directly contributed to their fear of defendant, their behavior in the custody disputes, and their decision not to come forward initially, especially about sexual assault or defendant's abuse of his federal power. The government would plan to seek a sidebar during trial if the government believes that defendant's cross-examination of these witnesses is about to open the door to the presentation of such additional context on redirect. See United States v. Segall, 833 F.2d 144, 148 (9th Cir. 1987) (cross-examination opened the door to

⁶ Defendant, for example, has produced court documents reflecting a restraining order he received against C.N. as part of their custody dispute.

1 additional evidence on redirect to avoid leaving jury with false
2 impression and remove unfair prejudice); cf. Darden v. Wainwright,
3 477 U.S. 168, 186 (1986) (holding, in ineffective assistance of
4 counsel context, that efforts to "portray petitioner as a nonviolent
5 man would have opened the door for the State to rebut with evidence
6 of petitioner's prior convictions"); United States v. Morris, No. 89-
7 50458, 1190 WL 167849 (9th Cir. 1990) (unpublished) (affirming district
8 court decision permitting redirect-examination into cooperator's
9 knowledge of defendant's membership in gang if the cross-examination
10 opened the door to the topic by attacking his motive to testify).

11 **F. Business Records**

12 The government intends to admit telephone records from Verizon,
13 Sprint, and AT&T as well as utility records from Southern California
14 Edison and subscriber information from Facebook that were produced in
15 discovery along with custodian of records declarations. Absent a
16 stipulation by defendant, the government intends to file a motion in
17 limine to admit these business records under Rule 803(6) and 902(11).

18 **G. Video and Photographic Evidence**

19 The government has identified certain video recordings and
20 photographs that it intends to introduce at trial. These include
21 videos and photographs taken during defendant's relationships with
22 K.L. and N.B., as well as more recent photographs that depict key
23 locations and items, such as defendant's home and his firearms.
24 These items will be authenticated by witnesses with knowledge and
25 familiarity of the items depicted on the video or photograph.

26 Photographs are generally admissible as evidence. See United
27 States v. Stearns, 550 F.2d 1167, 1171 (9th Cir. 1977) (photographs
28 of crime scene admissible). Photographs should be admitted so long

1 as they fairly and accurately represent the event or object in
2 question. United States v. Oaxaca, 569 F.2d 518, 525 (9th Cir.
3 1978). Also, “[p]hotographs are admissible as substantive as well as
4 illustrative evidence.” United States v. May, 622 F.2d 1000, 1007
5 (9th Cir. 1980). Photographs may be authenticated by a witness who
6 “identif[ies] the scene itself [in the photograph] and its
7 coordinates in time and place.” See Lucero v. Stewart, 892 F.2d 52,
8 55 (9th Cir. 1989) (internal quotation marks omitted).

9 Videos are akin to photographs, which the Ninth Circuit has held
10 “are admissible as substantive as well as illustrative evidence.”
11 United States v. May, 622 F.2d 1000, 1007 (9th Cir. 1980).

12 The government need not necessarily call a specific witness to
13 admit a particular video or photograph. Rule 901(a) simply requires
14 that a proponent of evidence make a *prima facie* showing of
15 authenticity so that a reasonable juror could find “that the item is
16 what the proponent claims it is.” Fed. R. Evid. 901(a). Thus, as
17 with photographs, any witness with knowledge of the events being
18 depicted in the video (like N.B.) would be able to authenticate, for
19 example, a video created by defendant and sent to her.

20 **H. Conditionally Admitting Evidence**

21 Federal Rule of Evidence 104(b) gives the trial court the
22 discretion to conditionally admit evidence dependent on proof of
23 later facts by the moving party. Fed. R. Evid. 104(b); see also
24 United States v. Gere, 662 F.2d 1291, 1294 (9th Cir. 1981) (“The
25 trial judge may make a preliminary determination of admissibility or
26 may admit the testimony conditionally, subject to ‘connecting up’
27 with the foundation to be eventually laid by the prosecution.”). If
28 the government fails to establish the required foundation for the

1 conditionally admitted evidence, the video would be subject to a
2 later motion to strike. See, e.g., United States v. Watkins, 600
3 F.2d 201, 204 (9th Cir. 1979).

4 Here, however, there is no dispute that the government will be
5 able to lay the necessary foundation as to the admissibility of its
6 evidence. Therefore, the government may seek to show certain
7 exhibits in opening statement or with early witnesses prior to
8 seeking to admit the exhibits in order to present a streamlined case.

9 **I. Facebook and Instagram Records**

10 The government intends to introduce screenshots of defendant's
11 social media accounts that were produced in discovery and taken by
12 victim N.B. and her mother, D.B., in 2013 when N.B. was in the
13 process of reporting defendant to law enforcement. These include
14 screenshots of the "About Us" page of defendant's clothing company,
15 Genetics Gear, in which defendant described his company as creating a
16 "niche in society which flaunted gear, aggressiveness, narcissism and
17 confidence. The original Inland Empire bad boy image. We followed
18 the mantra, 'We don't fake it, we just take it.'" Victim N.B.,
19 eyewitness I.T., and/or K.L. are all expected to testify that they
20 recognize the Genetics Gear logo, which comprised the word "Genetics"
21 above two crossing syringes and the words "Est. 2012" as the clothing
22 company defendant attempted to start in 2012. Additional posts by
23 defendant include: (1) an image of two hands making a heart symbol
24 and the words, "It's not rape, it's a snuggle with a struggle"; (2)
25 an image of the rapper Chris Brown, who famously assaulted the singer
Rihanna in 2009, and the words "I beat women, not animals"; (3) a
photograph of himself holding up a t-shirt that says "fighting solves
everything."

1 Defendant's posts were made to a variety of social media
 2 accounts, many of which have since been deleted or are no longer
 3 active. Facebook records confirm that posts from accounts still in
 4 existence did, in fact, belong to the defendant, and that when a user
 5 deletes an account, they purge all records related to that account,
 6 including the act of deletion, after a short period of time.
 7 However, for these deleted accounts, N.B. and other witnesses will be
 8 able to authenticate that the posts came from accounts that the
 9 witness either personally saw and knew belong to defendant, or that
 10 the witness reviewed and saw multiple profile pictures with
 11 defendant's image plainly visible. This is sufficient under the law,
 12 because "[t]he burden to authenticate under Rule 901 is not high."
 13 United States v. Recio, 884 F.3d 230, 236 (4th Cir. 2018); see also
 14 United States v. Ceballos, 789 F.3d 607, 618 (5th Cir. 2015)
 15 (characterizing the proponent's burden as "low"). In the trial
 16 context, the court "must merely conclude that the jury could
 17 reasonably find that the evidence is authentic, not that the jury
 18 necessarily would so find." Recio, 884 F.3d at 236-37.

19 In the context of social media accounts, a combination of
 20 sources can establish the authenticity of a post, such as "testimony
 21 about the origins of the pictures and accounts, the testimony of a
 22 Facebook custodian, the testimony of a co-conspirator, and the
 23 contents of the photographs themselves." United States v. Martin,
 24 822 F. App'x 521, 527 (9th Cir. 2020), cert. denied sub nom. Landry
 25 v. United States, 141 S. Ct. 1726, 209 L. Ed. 2d 486 (2021).
 26 Although a custodian of records declaration is one way to
 27 authenticate social media records, it is not the only means of doing
 28 so. See, e.g., Kremerman v. Open Source Steel, LLC, No. C17-953-BAT,

1 2018 WL 5785441, at *5 (W.D. Wash. Nov. 5, 2018) (holding certificate
2 of authenticity from Facebook not required to authenticate social
3 media records).

4 Any question as to the accuracy of the records goes to weight,
5 not admissibility. See United States v. Tank, 200 F.3d 627, 630 (9th
6 Cir. 2000) (holding government sufficiently authenticated chat room
7 records involving defendant) (citing United States v. Catabran, 836
8 F.2d 453, 458 (9th Cir. 1988)).

9 **J. Expert Testimony**

10 1. Dr. Janine Shelby, Ph.D

11 The government provided defendant notice that it intends to
12 introduce expert testimony from Dr. Janine S. Shelby, Ph.D, to
13 explain primarily to the jury why victims of sexual abuse may behave
14 differently from common sense expectations. Defendant moved to
15 exclude her testimony, and the Court orally denied defendant's motion
16 at the pretrial conference on November 15, 2021.

17 2. FBI Forensic Examiners

18 The FBI consensually extracted data from three digital devices
19 in this case: (1) an iPhone 4s belonging to victim N.B.; (2) an iPhone
20 4 belonging to victim N.B.'s mother, D.B.; and (3) a Motorola Droid
21 cell phone and accompanying SD card belonging to victim N.B. The
22 results of these extractions were produced in discovery to defendant,
23 including Cellebrite reports reflecting the complete metadata for all
24 of the items found on these devices.

25 The government intends to introduce at trial evidence seized
26 from these devices, including photographs, video recordings,
27 geolocation data, and text messages. Although N.B. and D.B. will be
28 able to recognize and authenticate the photographs, the precise date

1 and time of some of the items is also a key part of the government's
2 case. The government is willing to enter into stipulations about the
3 extracted data that would obviate the need for purely forensic
4 testimony as to when a specific text was sent or photograph taken,
5 but has not yet received an answer from defendant after multiple
6 efforts to confer about this topic.

7 Absent a stipulation, the government is prepared to call either
8 or both James M. Watkins, Jr., retired FBI Computer Analysis Response
9 Team ("CART"), and Murrieta Police Department Detective Paul C.
10 Johnson, Computer Forensic Examiner with the Orange County Regional
11 Computer Forensic Laboratory for the FBI. Out of an abundance of
12 caution, the government has provided defense counsel with notice of
13 these individual's qualifications and experience and the subject of
14 their anticipated testimony, namely, their extraction reports.

15 **K. Cross-Examination of Defendant**

16 A defendant who testifies at trial may be cross-examined as to
17 all matters reasonably related to the issues he puts in dispute
18 during direct examination, such as his intent and knowledge. "A
19 defendant has no right to avoid cross-examination on matters which
20 call into question his claim of innocence." United States v.
21 Miranda-Uriarte, 649 F.2d 1345, 1353-54 (9th Cir. 1981). See, e.g.,
22 United States v. Black, 767 F.2d 1334, 1341 (9th Cir. 1985) ("What
23 the defendant actually discusses on direct does not determine the
24 extent of permissible cross-examination or his waiver. Rather, the
25 inquiry is whether 'the government's questions are reasonably
26 related' to the subjects covered by the defendant's testimony.")
27 (internal quotations and citation omitted). The scope of cross-

1 examination is within the discretion of the trial court. Fed. R.
2 Evid. 611(b).

3 If defendant testifies, as set forth in the government's motion
4 in limine no. 1 and the government's opposition to defendant's motion
5 in limine to exclude evidence of prior convictions, the government
6 intends to introduce his guilty pleas in September 2015 to three
7 charges (assault with a deadly weapon, inflicting corporal injury on
8 N.B., and witness tampering, all felonies), and his conviction for
9 the first two of these offenses at sentencing a month later.

10 **L. Claims that the Government Should Call a Specific Witness**

11 Defendant may try to challenge the government's case by arguing
12 to the jury that the government should have called a specific
13 witness, for example, certain of defendant's family members, such as
14 Rita Olivas,⁷ John Olivas, Sr., or Jaykb Olivas, who may have
15 witnessed certain events or had direct interactions with charged and
16 uncharged victims and witnesses. If defendant raises during opening
17 statement, on cross examination, during an affirmative case, or
18 during closing argument that a certain witness is necessary, the
19 government may decide to respond to such argument. So long as it is
20 clear that the United States is not burden shifting or commenting on
21 defendant's right not to testify, it is permissible for the

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23 ⁷ There are text messages between defendant's mother, Rita
24 Olivas, and victim N.B., including concerning the November 3, 2012,
25 incident where defendant pulled his service weapon on N.B. and his
parents, in which Ms. Olivas acknowledges that her son pulled a gun
on N.B., although she later denied making such statements in her
testimony before the grand jury. The government does not intend to
present in its case-in-chief the text messages between Rita Olivas
and N.B., but if defendant challenges N.B.'s memory on these events
or that they took place, the text messages may become relevant.
Further, and importantly, Rita Olivas has passed away, so if
defendant creates the misleading impression that the government could
present her testimony, then it should be able to correct the record.

1 government to explain to the jury the defendant can subpoena
2 witnesses himself to present evidence. See United States v.
3 Necochea, 986 F.2d 1273, 1282 (9th Cir. 1993) ("A prosecutor is
4 entitled to comment on a defendant's failure to present witnesses so
5 long as it is not phrased to call attention to defendant's own
6 failure to testify.").

7 **M. Affirmative Defenses, Reciprocal Discovery, and Jury
8 Nullification**

9 The government requested notice of affirmative defenses
10 (including an entrapment, mental condition or duress, and/or alibi
11 defense) and reciprocal discovery by letter on August 28, 2018, and
12 in subsequent discovery letters. As of this filing, defendant has
13 not provided the government with notice of any affirmative defenses.
14 The only discovery defendant has produced were court records from the
15 custody dispute between defendant and his first wife, C.N. (formerly
16 C.R.), discussed above.

17 Rule 16 of the Federal Rules of Criminal Procedure creates
18 certain reciprocal discovery obligations on the part of defendants to
19 produce three categories of materials that they intend to introduce
20 as evidence at trial: (1) documents and tangible objects; (2) reports
21 of any examinations or tests; and (3) expert witness disclosure.
22 Rule 16 imposes on defendants a continuing duty to disclose these
23 categories of materials. Fed. R. Crim. P. 16(b)(1)(A), (b)(1)(C),
24 and (c). In those circumstances where a party fails to produce
25 discovery as required by Rule 16, the rule empowers the district
26 court to "prohibit the party from introducing evidence not disclosed,
27 or it may enter such other order as it deems just under the
28 circumstances." Fed. R. Crim. P. 16(d)(2)(C) and (D). To the extent

1 defendant may attempt to introduce or use any evidence at trial that
2 she has not produced to the government, such documents should be
3 excluded. See Taylor v. Illinois, 484 U.S. 400, 415 (1988)
4 (defendant's failure to comply with, or object to, government's
5 discovery request before trial justified exclusion of unproduced
6 evidence)

7 The government also reserves the right to object to any evidence
8 and/or argument relating to any possible jury nullification defense,
9 including concerning punishment or that this is a case that should be
10 tried in state court. A defendant has no right to present evidence
11 relevant only to such a defense. United States v. Powell, 955 F.2d
12 1206, 1213 (9th Cir. 1992); Zal v. Steppe, 968 F.2d 924, 930 (9th
13 Cir. 1992) (Trott, J., concurring) ("[N]either a defendant nor his
14 attorney has a right to present to a jury evidence that is irrelevant
15 to a legal defense to, or an element of, the crime charged.").

16 **VII. CONCLUSION**

17 The government respectfully requests leave to supplement this
18 Trial Memorandum, as necessary.

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